THE HIGH COURT

[2023] IEHC 402

Record No: 2021/5762P

Between/

PEDRO SABINO DE SOUZA

PLAINTIFF

-and-

LIFFEY MEATS (CAVAN) UNLIMITED COMPANY, LIFFEY MEATS UNLIMITED COMPANY, TOULEEN UNLIMITED COMPANY Trading As LIFFEY MEATS

DEFENDANTS

Judgment of Mr Justice Cian Ferriter dated this 11th day of July 2023

Introduction

1. These proceedings involve a claim by the plaintiff for damages for personal injuries arising out of the defendants' alleged negligence in respect of various aspects of his employment as a general operative in the defendants' meat production plant in Ballyjamesduff, County Cavan.

2. This judgment addresses an application brought by the defendants for an order setting aside an "unless order" made by this Court on 23 May 2022 which granted judgment to the plaintiff (with damages to be assessed) in respect of his claims for damages for personal injuries unless the defendants' delivered their defence within 10 weeks i.e. by 31 July 2022.

3. For reasons which I will come to the defence was not delivered by 31 July 2022 but was rather sent on 20 September 2022 and rejected by the plaintiff on the basis that the time for delivering the defence had expired pursuant to the unless order.

4. The defendants say that "special circumstances" exist, within the meaning of Order 27 rule 15(2) Rules Superior Courts ("O.27 r.15(2)" or "the rule"), justifying the set aside of the unless order. The plaintiff opposes the application on the basis that no such circumstances are made out.

Chronology of material events

5. The plaintiff commenced his proceedings by personal injury summons issued on 11 October 2021.

6. On 12 November 2021, the defendants' solicitor, Donnough Shaffrey of Shaffrey & Co ("Mr Shaffrey"), wrote to the plaintiff's solicitor enclosing a draft appearance and a notice for particulars, as well as indicating that the defendants intended to defend the case in full. The defendants entered an appearance through Shaffrey & Company on 19 November 2021.

7. On 22 November 2021, Mr Shaffrey wrote to an expert engineer enclosing papers and requesting a joint locus inspection and, thereafter, a report on liability.

8. The plaintiff delivered replies to particulars on 12 January 2022.

9. The defendants' counsel was sent papers on 14 January 2022 asking for a defence to be drafted. Mr Shaffrey also wrote to the plaintiff's solicitor on that date advising that his firm had retained an engineer and asking that the plaintiff's engineer liaise with the defendants' engineer.

10. The defendants' counsel replied to Mr Shraffrey within 14 days, on 28 January 2022, enclosing a draft full defence, a draft discovery request and seeking a consultation with the client.

11. On 4 February 2022, the plaintiff's solicitor sent a 28 day warning letter seeking the defendants' defence and threatening a motion for judgment in default of such defence.

12. Mr Shaffrey replied to that letter on 4 February noting that he had "a defence drafted by counsel which is with the defendant for approval before I can serve same", saying that he

had sent an urgent reminder in relation to the defence and that there was no need to issue a motion in the circumstances.

13. The defendants' solicitor and counsel had a consultation with their client on 28 February 2022. The defendants' counsel wrote that same day, 28 February 2022, enclosing an updated draft defence and directing that the draft defence should not be served until further instructions had been received from the defendants and until receipt of a report from the defendants' engineer. The defendants' engineer conducted a site inspection with the plaintiff's engineer on that date also.

14. Mr Shaffrey wrote to the plaintiff's solicitor on 2 March 2022 enclosing a notice for further and better particulars and noting again that the defence was drafted and that he had sought further instructions in relation to it and that he would revert on the defence once the further particulars had been replied to.

15. The plaintiff's solicitor replied on 3 March 2012 saying that adequate time had been provided for furnishing a defence and that a motion for judgment in default would issue if the defence was not received by close of business on 8 March 2022.

16. The motion for judgment in default of defence was issued on 9 March 2022, with a return date of 23 May 2022.

17. Mr Shaffrey wrote to the plaintiff's solicitor on 10 March 2022 saying he found it hard to understand why there was the need to issue a motion given that the defendants had not delayed and that he had kept the plaintiff's solicitor fully informed of the fact that a defence had been drafted subject to further instructions.

18. The defendants' solicitor received a report from his engineer on 7 April 2022 which was sent on to counsel at that point. Counsel was then informed on 16 May 2022 of the motion in default of defence and was sent further instructions from the defendants, and an updated defence was requested.

19. On 16 May 2022, the plaintiff's solicitor sent a letter about the motion. A legal executive in Mr Shaffrey's firm replied to that letter by email saying that a defence was drafted

by counsel but that further instructions were needed to finalise it and asking if the motion could be struck out with costs reserved. A trainee solicitor in the plaintiff's solicitor's firm replied by email saying that he was happy to agree to an extension of time of 8 weeks for the defence with costs of the motion to the plaintiff, such costs to be stayed pending conclusion of the case. The legal executive in Mr Shaffrey's firm responded to this email a few minutes later by email agreeing to that proposal. The trainee in the plaintiff's solicitor's firm followed up on 17 May 2022 by email saying that he had spoken with counsel and "*given the new Court rules around delivering Appearances/Defences, the Court has been reluctant to grant extension orders on consent and now it appears to be an unless type Order*" asking Mr Shaffrey's legal executive if she would be happy to consent to an unless order, but allowing 10 weeks for delivery of defence, i.e. expiring 31 July 2022. The legal executive responded by email on that date consenting to the unless order and asking that a copy of the order be sent on when it was to hand.

20. It was averred by Mr Shaffrey that his "legal secretary" (who was in fact a legal executive) did not understand the nature of an unless order and did not convey to him that she had consented to such an order.

21. The unless order was then made by the Court on 23 May 2022, as agreed.

22. The plaintiff's solicitors sent a copy of the unless order to Mr Shaffrey's firm on 30 May 2022 and a member of his staff sent an email to counsel enclosing the order and asking that he review the papers and revert with a final version of the defence. Mr Shaffrey averred that he did not review the Court order.

23. On 20 June 2022, Mr Shaffrey met his counsel in Monaghan Courthouse while dealing with a separate set of proceedings and mentioned the matter of the defence in this matter as he was anxious to get the defence finalised. As we shall see, the defendants' counsel found himself in difficult personal circumstances in the period from May 2022 to the end of July 2022 owing to the serious illness and then death of his mother (she died on 28 July 2022) and the ill health of his father during that period.

24. No defence was delivered by 31 July 2022. Mr Shaffrey sent a further email on 1 September 2022 to his counsel asking that he revert with an amended final defence.

25. On 13 September 2022, the plaintiff's solicitors sent a notice for trial to the defendants' solicitors and Mr Shaffrey sent a further reminder to his counsel for an amended final defence at that point.

26. On 20 September 2022, the defendants' solicitor sent a discovery request to the plaintiff's solicitors and enclosed the defence as received from his counsel on that date.

27. The plaintiff's solicitors wrote back the same day refusing the defence on the basis of the unless order.

28. Mr Shaffrey wrote to the plaintiff's solicitors on 26 September 2022 saying that his office had not consented to an unless order but rather had consented to an extension of time and asking that the defence be accepted. The plaintiff's solicitors replied on the same date wholly disagreeing with that characterisation of events, referencing the agreement to the unless order in the email of 17 May 2022 and the fact that a copy of the order had been sent on to the defendants' solicitors at the end of May.

29. The defendants' motion to set aside the unless order/judgment in default was issued on 17 October 2022.

Relevant evidence

30. There was an exchange of affidavits on the motion evidencing the chronology of events set out above.

31. Mr Shaffrey in his affidavits sought to explain and justify the failure to comply with the unless order of 23 May 2022.

32. Mr Shaffrey frankly averred that at no stage before the correspondence of 20 September 2022 did he understand that the order of 23 May 2022 was an unless order and that he had been operating under the misunderstanding that the secretary in his firm (i.e. the legal executive) had simply consented to an extension of time for the delivery of the defence and, when the

defence was not delivered within that extension of time, a further motion in default would need to issue.

33. As noted earlier, Mr Shaffrey was conscious of the fact that he needed to get a defence in and averred that, on 20 June 2022, he met his counsel in Monaghan Courthouse while dealing with a separate set of proceedings and mentioned the matter of the defence in this matter as he was anxious to get the defence finalised.

34. Notably, Mr Shaffrey avers that his counsel *"was in the midst of difficult personal circumstances in the period May to September 2022 which I understood to have been known to the solicitors and counsel acting on behalf of the plaintiff, in relation to his very ill mother, who died on 28 July 2022 and a difficult situation with his father's health. I understand that these difficult personal circumstances necessarily minimised his engagement with the defendants' file and his practice more generally."* He averred that understanding his counsel's ongoing difficulties in his personal circumstances, he was disinclined to continue to remind counsel of the need to finalise a defence. This was particularly so in circumstances where he did not understand that an unless order had been obtained against the defendants.

35. In fairness to the plaintiff's legal team, it should be said that the plaintiff's solicitor averred, in reply that he and his counsel were not aware of the personal circumstances of the defendants' counsel until receipt of Mr Shaffrey's affidavit setting those matters out.

Basis of application

36. The application was moved pursuant to the terms of O. 27, r. 15(2), which provides as follows:

> *"(2) Any judgment by default, whether under this Order or any other Order of these Rules, may be set aside by the Court upon such terms as to costs or otherwise as the Court may think fit,* ***if the Court is satisfied that at the time of the default special circumstances (to be recited in the order) existed which explain and justify the failure****, and any necessary consequential order may be made where an action has been set down under rule 9.*" [emphasis added.]

37. It might be noted that the terms of this rule do not deal with unless orders in terms. However, it is common case that this rule applies to judgments resulting from non-compliance with unless orders.

Date for determining whether "special circumstances" existed?

38. While the notice of motion grounding the application sought to set aside the unless order of 23 May 2022, as the application developed, the defendants clarified that what was sought to be set aside was the judgment resulting from non-compliance with the order which they said did not crystallise until 31 July 2022 i.e. the date on which the condition for judgment to be entered under the order occurred as a defence had not been delivered. This approach was rooted in the terms of O. 27, r. 15(2) which, as can be seen, gives the court a discretion to set aside *"any judgment by default"* if the court is satisfied that *"at the time of the default"* special circumstances existed which explained and justified "*the failure*". It was said that 31 July 2022 was the "time of default" as that was the date on which there was the failure to deliver a defence. (It might be observed that the rule is drafted without express reference to unless orders and the nature of those orders; it was however common case that the rule clearly captured judgments resulting from unless orders as well as straightforward orders for judgment in default).

39. Counsel for the plaintiff submitted that the application as originally brought sought to set aside the order on the basis that there was a default at the date of the order (essentially on the basis that the defendants' solicitor mistakenly thought an ordinary judgment in default order had been agreed) and that there was accordingly an issue as to the date on which "special circumstances" fell to be assessed. However, counsel for the plaintiff did fairly accept that the application was ultimately advanced, and met by him, on the broader basis that the judgment crystallised on 31 July 2022 and it was that judgment which the defendants sought to have set aside. Put another way, if a defence had been entered on or before 31 July 2022, no judgment would have resulted as there would have been no default.

40. I approach the matter on the basis that the judgment sought to be set aside crystallised immediately after 31 July 2022, at which point there had been a "failure" within the meaning of the rule to deliver a defence and the plaintiff was accordingly entitled to proceed, on foot of the order, to set his case down on an assessment only basis. That was the "judgment by default" referenced in the rule and the time of the default, in my view, was 31 July 2022 when the failure

to deliver a defence crystallised into the default judgment on liability, with damages to be assessed. Put another way, if a defence had been entered on or before 31 July 2022, no judgment would have resulted as there would have been no default.

41. Accordingly, the question of "special circumstances" under the rule is to be treated not just at the date of the court's order of 23 May 2022, but also at the date of the judgment by default of 31 July 2022.

42. This view is consistent with the approach adopted by the majority of the Supreme Court in *McGuinn v. Commissioner of An Garda Síochána* [2011] IESC 33 ("*McGuinn*"). While the question of the timing of the default judgment was not expressly addressed by Murray J. (for the majority), it is noteworthy that there was an unless order in that case and Murray J. took the view that the question of special circumstances applied at the date when the plaintiff obtained judgment (and not, it appears, at the date of the unless order). Kearns P. took the view that the rule as properly interpreted could not be confined to special circumstances at the time of default and could apply to a period after judgment had been entered (Kearns P., p. 20) but that view was not expressly adopted by Murray J. for the majority. In my view, the judgment of the majority in *McGuinn* supports the view that I have taken in this case that the question of special circumstances arises, on the facts here, as at 31 July 2022 when the judgment by default pursuant to the unless order *"kicked in"*.

Meaning of "special circumstances"?

43. The wording of O.27 r.15(2) closely mirrors that of the wording of O.8 r.1(4) RSC, as revised, which provides as follows:

> *"The Court on an application under sub-rule (3) may order a renewal of the original or concurrent summons for three months from the date of such renewal inclusive* ***where satisfied that there are special circumstances which justify an extension, such circumstances to be stated in the order****."* [emphasis added.]

44. As can be seen, the only difference between the material parts of the wording of the two rules is that O.27 r.15(2) uses the phrase "*special circumstances…which explain and justify the failure*" whereas O.8 r.1(4) uses the phrase *"special circumstances which justify an*

extension" (in both cases the special circumstances must be set out in the order). Given that special circumstances will in either case have to be explained in any event, it seems to me that the addition of the word "explain" does not materially alter the test in O.27 r.15(2) from that in O.8 r.1(4) – in both cases there must be special circumstances which justify the making of the order.

45. The terms of O.8, r. 1(4) were considered in some detail by the Court of Appeal (Haughton J.) in *Murphy v. HSE* [2021] IECA 3 ("*Murphy v. HSE*"), a case concerning an application to renew summons which had not been served within 12 months of issue.

46. Haughton J. took the view (at paras. 70 to 72) that *"whether special circumstances arise must be decided on the facts of a particular case, and it would be unwise to lay down any hard and fast rule"*. He noted that the test of *"special circumstances"* is *"generally accepted* [as being] *a higher test than that of 'good reason'"*, noting that this also follows from the use of the word "special": *"While this does not raise the bar to "extraordinary", it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present"*.

47. As recently confirmed by Noonan J. for the Court of Appeal in *Nolan v. Board of Management of St. Mary's Diocesan School* [2022] IECA 10, at paras. 25 and 26, *Murphy v. HSE* held that "special circumstances" must be established before the question of justification for the renewal under that rule arose, with questions of prejudice and the interests of justice being part of the analysis of justification and not part of the question of special circumstances.

48. The only appellate court judgment in which the terms of O. 27 r. 15(2) appear to have been considered to date is that of *McGuinn.* In that case, a motion for judgment in default of defence was issued returnable for 19 February 2007. It was agreed between the solicitor for the plaintiff and the solicitor for the defendants that the motion be struck out on consent with an order extending time for delivery of the defence by three weeks. The solicitor for the plaintiff wrote to the solicitor for the defendants on 26 February 2007, informing him that the motion had been dealt with as agreed i.e. struck out with costs to the plaintiff and a defence to be filed within three weeks. In fact, this letter was a miscommunication as, on 19 February 2007, the motion for judgment in default of defence was adjourned for three weeks to 12 March 2007. Understandably, as they were unaware of it, there was no appearance by the defendants on the

adjourned date of 12 March 2007 and the High Court judge dealing with the motion made an "unless order" granting judgment by default to the plaintiff unless the defence was delivered within a further 9 days i.e. by 21 March 2007.

49. The plaintiff's solicitor notified the defendants' solicitor on 13 March 2007 of the unless order and the defendants' solicitor replied on 14 March 2007 indicating that the defence would be filed by 21 March 2007. In fact, no defence was filed on that date. On 28 March 2007, the plaintiff's solicitor wrote to the defendants' solicitor indicating that he was proceeding to have the High Court order perfected and served since the defence had not been filed. The defendants' solicitor then delivered a full defence on 20 April 2007, which was rejected and returned by the defendants' solicitor on 26 April 2007 on the basis that it was too late to accept the defence. The defendants brought an application to set aside the order for judgment some 21 months later. The High Court (Cooke J.) refused to set aside the judgment in default, placing particular emphasis on the inordinate and inexcusable delay on the part of defendants in bringing the application to set aside. The High Court's decision was appealed to the Supreme Court.

50. The Supreme Court, by a majority (Fennelly J. agreeing with Murray J.; Kearns P. dissenting), set aside the judgment in default. Murray J. (for the majority) held that the defendants had established that there were *"special circumstances"* at the time of the plaintiff obtain judgment against them (p. 7) as follows:

> *"In my view the appellant has clearly established that there were "special circumstances" at the time when the plaintiff obtained judgment within the meaning of the Rule. The defendants' solicitor were not only completely unaware that the motion for judgment, instead of being struck out, had been adjourned for three weeks but afterwards he had been mistakenly (and I do not attribute any male fides at all in this regard) told by the plaintiff's solicitor that it had been struck out. As a result the defendants' solicitor was totally unaware that an "unless order" had been made by Herbert J. until eventually notified to that effect by the plaintiff's solicitor. All of this clearly constitutes special circumstances within the meaning of the Rule."*

51. Kearns P. (at p.27) also accepted for the same reasons that special circumstances were made out but took a different view to that of Murray J. on the question of whether the

defendants' delay in bringing the set aside application disentitled them to set aside of the order; Murray J. took the view that the delay was not such as to disentitle the defendants to set aside of the order and Kearns P. disagreed on that question.

52. The judgments in *McGuinn* did not elaborate as such on the question of what might or might not constitute " special circumstances" within the rule. It seems to me that the approach taken by the Supreme Court on that question on the facts of *McGuinn* is not inconsistent with the approach taken by the Court of Appeal (Haughton J.) in *Murphy v. HSE* on the equivalent concept of special circumstances in O.8 r.1(4) and I therefore approach the question of special circumstances within O.27 r 15(2) on the basis that the test of *"special circumstances"* is a higher test than that of "good reason" and that while this does not raise the bar to *"extraordinary",* it nonetheless suggests that some fact or circumstance that is beyond the ordinary or the usual needs to be present.

Can solicitor mistake/inadvertence amount to special circumstances?

53. There was some debate at the hearing of the application as to whether mistake or inadvertence by a solicitor leading to him or her being unaware of the terms of a default order or the fact that an unless order had been made could amount to "special circumstances" within the rule.

54. In his judgment in *Murphy v. HSE* , Haughton J. said as follows (at para. 77), in the context of the requirement of "special circumstances" in O.8 r.1(4):

> *"77. At the level of principle a question also arises as to whether inadvertence on the part of a plaintiff or their solicitors can ever amount to or be relied upon as a special circumstance. As far as a plaintiff is concerned this is very fact dependent and it is probably not helpful to speculate in a vacuum. As far as legal advisors are concerned in my view inadvertence or inattention, for example in effecting service of the summons, will rarely constitute "special circumstances". Legal advisors must be taken to be aware of the twelve month time limit for service of the original summons, and the consequences of allowing it to lapse. Peart J., in the context of "good reason", in Moynihan v Dairygold Co-operative Society Limited[2006] IEHC 318, said —*

> *"38 …This is an opportunity to give a timely warning to practitioners that proper attention must be given to the question of service of proceedings after issue, especially where there is a likelihood that after expiration of one year from the date of issue, the Statute will have expired."*
>
> *If inadvertence of this nature would not reach the threshold of "good reason" it is even more unlikely to amount to "special circumstance"."*

55. Earlier in his judgment in *Murphy v. HSE*, at paragraph 48, Haughton J. noted a decision of Barr J. in *O'Connor v. The HSE* [2020] IEHC 551, where Barr J. "*rejected the plaintiff's solicitors plea made that he had mistaken the legal position, holding that he could not plead his lack of knowledge as a means of resisting the defendant's application."*

56. Counsel for the defendants submitted that a *"more tolerant"* view of special circumstances could be taken under O. 27 r. 15(2) than under O. 8 r. 1(4) as the rationale for the two rules was different. I do not believe it is helpful to approach the matter on the basis of degrees of tolerance. It is clear that, in respect of both rules, a more demanding set of reasons or circumstances is required than under the old regime, as part of a general tightening of approach to compliance with deadlines and expedition of litigation in light of the constitutional and Convention imperatives of ensuring that justice is administered efficiently and expeditiously. It does not seem to me that there is any basis for applying a more lax or tolerant view of what might amount to special circumstances under O.27 r.15(2) than under O. 8 r. 1(4). It can readily be seen how, given that the 12-month time limit for service of a summons following its issue is a fixed and well-known period, that a mistake by a legal adviser in relation to that period would not amount to a *"special circumstance"* in the normal course. While I do not think that the same reasoning is necessarily transferable to the concept of special circumstances under O.27 r.15(2) (given that there to no one fixed period for delivering a defence to judgment in default; it will depend on the terms of the order agreed or imposed), the general point remains that to treat a mistake or inadvertence by a solicitor as to the period ordered by a court for delivering a defence, failing which judgment will follow, would risk undermining the rationale for the rule being that of ensuring greater compliance with deadlines and court orders and ending the old culture of lax approaches to court-imposed deadlines and indulgence of disregard for court orders on procedural matters.

57. Accordingly, in considering the question of whether special circumstances is made out for the purposes of O.27 r.15(2), I adopt the approach which Haughton J. took in *Murphy v. HSE* in relation to the equivalent requirement in O.8 r.1(4), namely that while each case will be fact-specific and it is not wise to lay down any hard and fast rule, generally speaking solicitor mistake or inadvertence as to the terms or existence of an order for judgment in default (including an unless order) will not amount to special circumstances within the meaning of the rule.

Did special circumstances exist here?

58. Counsel for the defendants, in their written submissions, advanced four matters which they contended amounted to *"special circumstances"* in this case. The first matter was that the case was being defended in full from the outset, with the plaintiff's solicitor having been told that a draft defence had been prepared with an intention to serve the defence upon receipt of an engineer's report and instructions from the defendants. The second matter relied upon as part of the special circumstances was that the case was complex and not a routine one, which clearly required input from experts, given that the plaintiff's claim essentially encompassed three different causes of action: an allegation of repetitive strain injury during the course of employment; alleged injury to eyes due to blood splash in February 2020; and alleged exposure to tuberculosis between April 2018 and December 2020. It was properly accepted by counsel for the plaintiffs at the hearing that these two matters were more matters which went to the question of the balance of justice (if reached), rather than the question of *"special circumstances"* given that these matters could not of themselves explain or justify the default of not having delivered the defence within 10 weeks.

59. Rather, counsel for the defendants focused at the hearing of the application on the other two special circumstances advanced in their written submissions: firstly, on the fact that the defendants' solicitor was unaware that the order for judgment in default of defence was an unless order and secondly that the personal circumstances of the defendants' counsel (who in the period May 2022 onwards was required to care for his very ill mother, who died on 28 July 2022 (some three days before the defence was due) and his ill father) had prevented him from engaging sufficiently with his practice and with the defendants' file to be able to turn around a final defence by 31 July 2022.

60. The plaintiff's principal submission was that, when properly analysed, the reason for the failure to comply with the unless order was the defendants' solicitor's inadvertence that led him to remaining in the dark about the nature of the order despite multiple communications as to the nature of the order between the plaintiff's solicitor and the defendants' solicitor's firm. While it was accepted that the defendants' solicitor dealt with matters with alacrity up to the date of issue of the motion, it was submitted that the facts thereafter simply did not disclose circumstances which would amount objectively to *"special circumstances*" within the relevant rule.

61. It was submitted that the test for special circumstances was an objective one. This was a case of multiple inadvertence on the defendants' solicitor's part. The circumstances were not ones outside the control of the defendants' solicitor. In particular, counsel for the plaintiff relied on the following matters:

(a) an employee of the defendants' solicitors firm clearly agreed the unless order and held herself out as having had authority to do so;
(b) after the unless order was obtained, a copy of it was sent to the defendants' solicitors firm, was read by a different staff member to the legal executive and was forwarded on to counsel for the defendants who had prepared the draft defence;
(c) the defendants' solicitor had never properly acquainted himself with the terms of the order (despite having been sent a copy of it) or the correspondence on file which showed that an unless order had been agreed;
(d) the defendants' solicitor, on his own case, believed that an order had been made for delivery of defence and no extension of time was ever sought when the time he thought had been agreed was about to expire or had expired.

62. While counsel for the plaintiff did not dispute the defendants' counsel's personal difficulties in the period in issue, it was submitted that the real reason for not meeting the deadline was the defendants' solicitor's lack of awareness of the fact that the order for judgment was an unless one. It was, accordingly, submitted that special circumstances were not made out and, as they were not made out, the court did not need to reach the question of the balance of justice.

63. As we have seen, the legal executive in the defendants' solicitors firm had consented to an unless order not understanding the significance of such an order. This staff member did not convey to Mr Shaffrey, the principal solicitor in the firm, that she had consented to an unless order and this was not spotted by Mr Shaffrey when the order was sent in. Mr Shaffrey deposed that he did not become aware of the fact that the judgment in default order was an unless order until 20 September 2022, when he sent the defence to the plaintiff's solicitor and the plaintiff's solicitor responded by way of letter pointing out the existence of the unless order.

64. In my view, the failure by the defendants' solicitor to become aware of the fact that an unless order had been agreed to by a member of his staff and had been sent to his firm (and onwards to his counsel) would not of itself amount to special circumstances within the rule. If a solicitor chooses to delegate agreements in relation to important procedural matters such as the terms of orders for judgments in default (including unless orders) to a non-legally qualified staff member (or, indeed, to any staff member qualified or not), he cannot escape the consequences of that by saying that his staff member did not understand the consequences of the terms agreed or that he was not aware of the terms agreed. I accept the point made on behalf of the plaintiff that the plaintiff's solicitor was entitled to assume that the member of staff of the defendants' firm with whom the agreement as to the terms of the unless order was reached, was doing so with both with an understanding of what had been agreed and with authority to reach that agreement. This is copper fastened by the fact that the terms of the order were sent on to the defendants' solicitors firm subsequent to the order being made.

65. If all that had been involved here was inadvertence on the defendants' solicitor's part, notwithstanding his alacrity in relation to taking appropriate steps in defence of the proceedings up to the date of the motion, I would not have accepted that special circumstances existed. However, there does seem to me to be a very particular feature of the facts here, namely, the fact that the defendants' counsel was not in a position to attend to his practice with anything like the same degree of focus in the period from 23 May 2022 to 31 July 2022, given that his mother was very ill in that period and, in fact, died on 28 July 2022 and that his father was also in ill health in that period. While this is not a case where the counsel in question was not practicing at all in that period, it does seem to me to amount to a special circumstance which led to a position where the defendants' solicitor did not push for a defence from him before the end of July in those circumstances and where the counsel was not in a position to prioritise finalisation of the defence in that period owing to those exceptional personal circumstances.

66. Up to May 2022, the defendants' counsel had dealt with matters in relation to this case with considerable alacrity. In my view, absent the exceptional personal circumstances he was operating under in the period May to end of July 2022, he would have continued to do so and would in all probability have delivered the final defence well before 31 July 2022. This is borne out by how he had dealt with the case before his difficult personal circumstances. He was sent papers on 14 January 2022 asking for the defence to be drafted. He replied within 14 days, on 28 January 2022, enclosing a draft full defence, a draft discovery request and seeking a consultation with the client. That consultation took place four weeks later, on 28 February 2022. He wrote that same day, 28 February 2022, enclosing an updated draft defence and directing that the draft defence should not be served on the further instructions were received from the defendants and until receipt of a report from the defendants' engineer. The defendants' counsel was written to on 16 May 2022 informing him of the motion for judgment in default and then sent a copy of the order on 30 May 2022; in contrast to his previous quick responses on this case, he did not respond to these communications and I accept that this is explained by the personal circumstances he was then operating under. I have little doubt that but for the very particular personal circumstances being experienced by the defendants' counsel in the period from May 2022 to the date on which the judgment for default kicked in on 31 July 2022, that the defendants' counsel would have delivered a defence in this period, notwithstanding that the defendants' solicitor was operating under the misconception that the terms of the order for judgment in default of defence were not in *"unless"* terms; the fact remained that even on the defendants' solicitor's understanding of events, a defence had been directed to be delivered by the defendants before 31 July 2022 and he had asked his counsel to have the defence ready by then.

Do the special circumstances "explain and justify" the default – interests of justice

67. Being satisfied that special circumstances have been made out, it is necessary to turn to the balance of justice (i.e. whether set aside of the judgment in default is justifiable). In my view, the special circumstances identified justify the set aside of the judgment in default in this case. The defendants moved swiftly to bring the set aside application once their solicitor became aware of the error and the defendants' counsel's personal situation was such that he was in a position to deliver the finalised defence. The plaintiff was aware from the very outset that the defendants intended to fully defend the matter and that the defendants had a draft

defence which was to be finalised on receipt of the defendant's expert engineering report and further instructions from the defendants. The proceedings had a degree of complexity in them, in light of the various different causes of action sought to be advanced. The defendants claim that they have a limitations defence to at least part of the plaintiff's claims (based on a medical report relied upon by the plaintiff when making an application for permission to introduce these proceedings before the Personal Injuries Assessment Board which referenced, *inter alia*, the plaintiff developing back pain in 2015) and that they have in any event a full defence on liability to all the claims which they say is supported by their expert engineers' evidence. I am satisfied that the defendants have an arguable defence in the matter and that this is relevant to the balance of justice. Finally, in terms of the balance of justice, in my view there is no prejudice to the plaintiff resulting from set aside of the judgment in default which could not be addressed by an appropriate order as to costs.

68. Accordingly, in my view, the special circumstances both explain and justify the default here and it would be appropriate to set aside the judgment obtained in default by virtue of non-compliance with the unless order on the very particular facts of this case. I will recite as special circumstances in the order "the fact that the very difficult personal circumstances of counsel for the defendants in the period from May 2022 to 31 July 2022 was such that the solicitor did not press him for a defence and that counsel was not in a position to prepare and deliver a finalised defence before 31 July 2022".

69. In my view it would be in the interests of justice that as a condition of the set aside order, the defendants pay both the costs of the motion for judgment in default and the plaintiff's costs of dealing with the application to set the judgment in default aside, such costs to be adjudicated in default of agreement.

Conclusion

70. I will set aside the judgment obtained on foot of non-compliance with the unless order, on the basis of the special circumstances set out above and on the basis that the defendants' pay both the costs of the motion for judgment in default and the plaintiff's costs of dealing with the application to set the judgment in default aside, such costs to be adjudicated in default of agreement.